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50,000 CHILDREN ARE WAITING: PERMANENCY, PLANNING AND TERMINATION OF PARENTAL RIGHTS UNDER THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980

JILL SHELDON*

We take care of our possessions for our children. But of the children themselves we take not care at all. What an absurdity is this.

Saint John Chrysostom¹

I. INTRODUCTION

It is estimated that over 600,000 children are currently in foster care in America.² Out of that figure, between 40,000 and 80,000 children have been freed for adoption through the termination of parental rights, yet these children remain unadopted.³ They have no real "parents," and remain legal orphans, or wards of the state.⁴ Some of these children will drift from one foster home to another in their early childhood.⁵ They will remain in foster care with foster parents who are

* Articles Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL.

¹ MARIAN WRIGHT EDELMAN, GUIDE MY FEET—PRAYERS AND MEDITATIONS ON LOVING AND WORKING FOR CHILDREN 18 (1995).

² Mona Charen, *Needed: Homes for 50,000 Children; What Each of Those Foster Kids Needs is a Permanent, Stable, Loving Home; Why Are So Many Children Kept Waiting?*, ATLANTA CONST., Apr. 26, 1995, at 15A. (These figures were taken from 1995).

³ See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights in Foster Care - An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 140 n.42 (1995); see also, Conna Craig, "What I Need is a Mom"; *The Welfare State Denies Homes to Thousands of Foster Children*, 73 POL'Y REV. 41, 41 (1995). In the summer of 1995, Craig estimated the figure at 50,000. *Id.*

⁴ Guggenheim, *supra* note 3, at 121-22.

⁵ Craig, *supra* note 3, at 45.

The ACLU reports that one in 10 foster children remains in state care longer than 7.4 years. At least 40,600 foster children have been in care for five years or longer; another 51,300 have been in care between three and five years. System kids, on

unable or unwilling to adopt them.⁶ Many will "age out" of the system at eighteen, with no real family life.⁷ These problems will occur despite the efforts of Congress to alleviate them with the enactment of the Adoption Assistance and Child Welfare Act of 1980 (AACWA).⁸

The AACWA was created to de-emphasize reliance on foster care and encourage permanency planning for children through the reunification of families when possible and termination of parental rights when reunification is not possible.⁹ In recent years, however, the number of children in foster care has increased rather than decreased,¹⁰ and it appears that the good intentions of the Act are not being realized.¹¹ The number of children being adopted is not keeping up

average, live with three different families, though 10 or more placements is not uncommon.

Id.

⁶ *Id.* Craig blames the system for attracting parents who can not or will not adopt children in their care, by making it difficult and time consuming to adopt, or providing financial incentives to remain a foster parent as opposed to an adoptive parent. *Id.* (Foster parents receive money each month for support of a foster child, but adoption subsidies are often less than foster care subsidies or are not available at all.) *Id.*

⁷ See Verne Barry et al., *What Will Happen To the Children? Who Will Step In When Welfare Is Abolished?*, 71 POL'Y REV. 7, 9 (1995). "Annually, about 15,000 teens 'age-out' of foster care and, like Katie, are left to navigate early adulthood without the supports that many of us take for granted." *Id.* Children who age-out of the foster care system with no parental figure, guidance, or financial support are in a precarious situation. *Id.* In Los Angeles, 39% of the homeless population are former foster children. *Id.* Many children exit the dependency of foster care at age 18, only to enter another dependent system, like welfare. *Id.* If welfare reform should occur, one way of cutting down on the welfare population would be by meeting the needs for permanency for children in foster care. *Id.*

⁸ See Guggenheim, *supra* note 3, at 125-34, 140. The author uses his study of child welfare systems in New York and Michigan after the enactment of the AACWA to highlight the continued problems in the foster care system. *Id.* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 1980 U.S.C.C.A.N. (94 Stat.) (codified as amended in scattered sections of 42 U.S.C.A.).

⁹ S. REP. NO. 336, 96th Cong., 2nd Sess. 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1450, 1450.

The committee amendment involves a major restructuring of Social Security Act programs for the care of children who must be removed from their own homes. In particular, the incentive structure of present law is modified to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes.

Id.

¹⁰ See Guggenheim, *supra* note 3, at 138; *see also* Craig, *supra* note 3, at 45; Candace M. Zierdt, *Make New Parents But Keep the Old*, 69 N.D. L. REV. 497, 503 (1993).

¹¹ See Cristina Chi-Young Chou, *Renewing the Good Intentions of Foster Care: Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and Substantive Due Process Right to Safety*, 46 VAND. L. REV. 683, 684 (1993). The author notes:

Among the interrelated problems merging into the foster crisis are an increased number of foster children, weakened family relationships, deteriorating social con-

with the number of parental rights being terminated.¹² Rather than creating permanency in the lives of children in foster care, termination of parental rights appears to be creating a new breed of state orphans.¹³

This increase in orphaned children has occurred at a time when many Americans believe parental rights are not being terminated quickly enough.¹⁴ States are creating stricter laws governing the termination of parental rights, limiting the length of time a parent is given to prove he or she is taking steps to improve conditions at home in order to reunite the family.¹⁵ Department of Social Services (DSS) programs nationwide are being criticized for not recognizing when a child is in trouble, and not removing children from homes quickly enough to prevent abuse.¹⁶ Amidst public fear and outrage over child abuse, children are languishing in foster care virtually unnoticed.¹⁷ Parental rights are being terminated in order to protect the abused child from the abuser, but the permanency planning intention of the AACWA is not receiving the attention it deserves.¹⁸

This Note will examine the termination of parental rights dilemma, focusing primarily on the children currently freed for adoption who still remain within the foster care system. Part II will examine the

ditions, overextended and inefficiently managed child welfare agencies, and poor training of case workers and prospective foster parents. These factors have resulted in an ineffective bureaucracy that has lost sight of its purpose—safe, temporary care for children in search of permanent homes.

Id.

¹² Guggenheim, *supra* note 3, at 133. Guggenheim bases his conclusions on studies conducted in New York and Michigan, and then compares his study to a national study. *Id.* at 125–34.

¹³ *Id.* at 121–22.

¹⁴ See Michael Grunwald, *Abuse Shows Danger of Birth-Family Bias*, BOSTON GLOBE, Jan. 27, 1996, at A1, A12; HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* 143 (1995); see generally Phyllis Coleman, *A Proposal for Terminating Parental Rights: "Spare the Parent, Spoil the Child,"* 7 AM. J. FAM. L. 123 (1993); David Van Biena, *Abandoned To Her Fate*, TIME, Dec. 11, 1995, at 32.

¹⁵ Jonathan Rabinovitz, *Rowland Plan Would Ease Early Adoption in Abuse Cases*, N.Y. TIMES, Jan. 5, 1996, at B1 (discussing new reform legislation in Connecticut); *Child Abuse: A Special Editorial: First Preserve the Child*, ATLANTA J. & CONST., Nov. 12, 1995, at 4G [hereinafter *First Preserve the Child*] (discussing the need for reform in Georgia by examining child protection laws in Utah and California); James D. Lawson, *New Approaches Needed to Save Foster Children*, BUFF. NEWS, Mar. 27, 1995, at 2 (discussing the need for reform in New York, in the wake of proposed budget cuts); Michelle Ruess, *Bill on Ending Parental Rights Goes to Governor*, RECORD, Jan. 10, 1996, at A3 (discussing early 1996 proposal for reform in New Jersey).

¹⁶ See generally, Jill Smolowe, *Making the Tough Calls*, TIME, Dec. 11, 1995, at 40–44 (explaining the frustration of the people of New York City over the death of Elisa Izquierdo); see also Grunwald, *supra* note 14, at A12. "Carlisle (DSS Commissioner) often says that DSS only does two things wrong: it takes kids away, and it leaves kids where they are." *Id.*

¹⁷ See generally, Chou, *supra* note 11.

¹⁸ See *id.* at 684; see generally, Guggenheim, *supra* note 3.

Adoption Assistance and Child Welfare Act of 1980, including the goals Congress intended to satisfy, the programs intended to reunite existing families, and the guidelines for termination of parental rights.

Part III will examine what has happened with foster care in this country since the enactment of the AACWA, as well as the mood of the country regarding child welfare and the family, including recent political trends and responses from state governments. Part IV will discuss possible solutions to the problem of foster care drift and state orphans, with an examination of programs currently in existence in Massachusetts and other states.

II. THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980

A. *Brief History*

In the 1970s, the problem of foster care placement became the center of criticism of the child welfare system.¹⁹ Individuals testifying before Congress argued that children were being removed from the home by a welfare department devoid of professional judgment or concern for the family.²⁰ The problem of children "drifting" from one foster home to another was occurring due to an inept child welfare system that was failing to monitor children in foster care, and failing to reunify parent and child.²¹

In 1977, the Supreme Court of the United States recognized the problem of foster care drift in the state of New York in *Smith v. Organization of Foster Families*.²² The Court noted that children were

¹⁹ See, Mary Ann Jimenez, *Permanency Planning and the Child Abuse Prevention and Treatment Act: The Paradox of Child Welfare Policy*, J. SOC. & SOC. WELFARE, 401, 410-13.

²⁰ See *id.* at 411-12. The author highlights the mood of the hearing when she writes:

Any possibility that professional skill and judgment were at the heart of the placement process was wholly eliminated: "The welfare department can place the child in virtually any licensed foster home or institution at its whim." Voluntary placements were criticized: one witness argued that they are "informally coerced" and that these placements should be outlawed for they provide "no independent check of a social worker's determination that placement is necessary. . . ." The entire child welfare establishment was assailed: "Individual social workers and judges . . . make highly discretionary decisions."

Id. at 411 (citing House Hearings, 1976, p. 102, 37, 75, 83). See also Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.A.).

²¹ See Jimenez, *supra* note 19, at 410; see also Alice Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W.L. REV. 223, 224 (1989-90).

²² 431 U.S. 816 (1977).

spending a median length of time of over four years in foster care,²³ with nearly sixty percent of those children living with more than one foster family, and approximately twenty-eight percent living with three or more.²⁴ Children were removed from their home too easily, and languishing in foster care for years, thereby lacking a true "psychological family."²⁵

In the National Study of Social Services to Children and Their Families, a 1977 study for the Department of Health, Education and Welfare, Congress learned that the median time children removed from their homes spent in foster care was two and one-half years.²⁶ In addition, thirty-eight percent of the children were in foster care placement for more than two years.²⁷ In response to growing criticism of the social services system, Congress enacted the Adoption Assistance and Child Welfare Act of 1980 (AACWA).²⁸

B. *The Act*

The AACWA is an attempt to nationalize rules governing state supervision of children.²⁹ The Act de-emphasizes the use of foster care and encourages greater efforts to place children in permanent homes through the reunification of the family, or placement of children in adoptive homes.³⁰ The AACWA is based on the idea that foster care is designed to be a temporary security for children removed from their home,³¹ and every effort should be made by states to either prevent removal from the home, encourage reunification of the family through social services, or find permanent adoptive homes.³² The concern over children suffering from the instability and uncertainty associated with foster care "drift" resulted in more specific goals for foster care.³³

²³ *Id.* at 836.

²⁴ *Id.* at 837.

²⁵ See generally, GOLDSTEIN, FREUD, & SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD, (1973). The authors believe each child needs a "psychological parent," usually the biological parent, for proper emotional development. *Id.* They do recognize that foster parents can also be "psychological parents," but bouncing in and out of foster care will not allow the proper bond to form. *Id.*

²⁶ S. REP. NO. 336, *supra* note 9, reprinted in 1980 U.S.C.C.A.N. at 1460.

²⁷ *Id.*

²⁸ See *id.* at 1459.

²⁹ Guggenheim, *supra* note 3, at 122.

³⁰ See S. REP. NO. 336, *supra* note 9, reprinted in 1980 U.S.C.C.A.N. at 1450.

³¹ Chou, *supra* note 11, at 683.

³² *Id.* at 689.

³³ Zeirdt, *supra* note 10, at 500.

The AACWA encourages states to make "reasonable efforts"³⁴ to maintain families by matching federal foster care funds for the state with required compliance by the state of stricter rules concerning foster care.³⁵ If a state chooses not to comply with the guidelines of the AACWA, federal funds for foster care and adoption assistance will not be available.³⁶ The focus of the AACWA is on permanency planning for children and family preservation whenever possible.³⁷

To comply with the Act, states are required to create social programs to help the family prevent the need for removal before a child is at risk.³⁸ These services include temporary child care, counseling sessions, or financial assistance.³⁹ If, however, it becomes necessary for a child to be removed from the home, "reasonable efforts" must be made in order to bring about quick and eventual reunification of the family.⁴⁰ Drug and alcohol abuse counseling, parenting classes, and family counseling programs are encouraged.⁴¹ Prior to the Act, the law placed little emphasis on the family, except in the reluctance to terminate parental rights.⁴² Now, the family and permanence for the child are priorities in the foster care system.⁴³

Should it become necessary to remove a child from the home and place him/her in foster care, the Act strives to prevent the foster care drift which occurred previously, and reduce the length of time a child spends in temporary foster care.⁴⁴ States are required to keep records

³⁴ 42 U.S.C.A. § 671(a)(15) (Supp. 1996) Adoption Assistance and Child Welfare Act. The Act requires reasonable efforts to be made "prior to the placement of a child in foster care, to prevent or eliminate the need for the removal of the child from his home." *Id.* A criticism of the AACWA is its failure to define "reasonable efforts." See Joseph Gerth, *Weighing Children's Safety Against Family Unity*, COURIER-J., Feb. 19, 1996, at A6. "Critics say that the law is ambiguous, leaving social workers unsure what 'reasonable efforts' they must make to keep children in their natural homes." *Id.* See also, Gina Macris, *Reuniting Families Leaves Abused Children In Limbo; New Laws Prod Debate Among Social Workers About Trying To Fix Broken Families*, THE PROVIDENCE J.-BULL., Feb. 5, 1995, at 1A. "Federal law orders child welfare officials to make 'reasonable efforts' to reunite families torn apart by abuse or neglect, but it does not define that term, which can vary with the circumstances of each case." *Id.* See also Shotton, *supra* note 19, at 225.

³⁵ 42 U.S.C.A. § 671(a) (Supp. 1996) Adoption Assistance and Child Welfare Act.

³⁶ *Id.*

³⁷ Zierdt, *supra* note 10, at 500-01.

³⁸ 42 U.S.C.A. § 671(a)(15) (Supp. 1996) Adoption Child Welfare Act.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Chou, *supra* note 11, at 691.

⁴² See Guggenheim, *supra* note 3, at 122.

⁴³ S. REP. NO. 336, *supra* note 9, reprinted in 1980 U.S.C.C.A.N. at 1450, 1459.

⁴⁴ *Id.* at 1459. "[C]oncern has been expressed over the need for increased efforts to move children out of foster care and into more permanent arrangements by reuniting them with their

of children in foster care.⁴⁵ Federal funds are made available to states in order to encourage the optional creation of intricate computerized tracking networks to monitor the progress of children in the foster care system.⁴⁶ All states are required to create foster care plans for their child welfare system, as well as individualized case plans for each child.⁴⁷ Every six months a court or administrative review of a child's plan is required, and after eighteen months a determination should be made to either reunite the family, or terminate parental rights to free the child for adoption.⁴⁸ Termination of parental rights should be the last option, but if a child cannot be reunited with the family, a permanent home for that child should be found quickly.⁴⁹ The eighteen month time limit is intended to push states to help families reunite quickly, or, when reunification is not possible, to free a child for adoption in the hope of establishing a permanent, stable home.⁵⁰ Congress intended to de-emphasize the need for and reliance on foster care.⁵¹ Through states efforts to reunite families or encourage adoption if reunification failed, Congress envisioned a decrease in the number of children in foster care.⁵²

Many states have followed the guidelines for the creation of individual case plans for each child, as well as the mandatory review at eighteen months of the progress of the child's plan.⁵³ Compliance by the states is not surprising, since the federal government has a powerful bargaining tool: money. Federal funds will not be made available to state foster care systems which fail to comply with the Act.⁵⁴ Following the plan, however, has not resulted in meeting the original goal of Congress, which was de-emphasis on the need for foster care. With an

own families when this is feasible, or by placing them in adoptive homes." *Id.*; see also, Chou, *supra* note 11, at 689.

⁴⁵ 42 U.S.C.A. § 679(C) (Supp. 1996) Adoption Assistance and Child Welfare Act.

⁴⁶ S. REP. NO. 336, *supra* note 9, reprinted in 1980 U.S.C.C.A.N. at 1461.

⁴⁷ 42 U.S.C.A. § 675(1)(B) (Supp. 1996). The statute provides for a written document detailing the placement of the child, as well as the goals for the child in placement. Such goals include services provided to the family in order to improve the conditions at home and facilitate return to the home or other permanent placement. *Id.* When each child is placed within the system, case workers must set goals for permanent family solutions. *Id.*

⁴⁸ 42 U.S.C.A. §§ 675(5)(a)–675(5)(c) (Supp. 1996).

⁴⁹ See Guggenheim, *supra* note 3, at 134; see also, Deborah A. Ratterman, *Permanency Planning Hearings*, 14 CHILDREN'S LEGAL RTS. J. Summer/Fall 3–4, 11, (1993).

⁵⁰ Guggenheim, *supra* note 3, at 123.

⁵¹ S. REP. NO. 336, *supra* note 9, reprinted in 1980 U.S.C.C.A.N. at 1450, 1461.

⁵² See *id.* at 1450–69.

⁵³ 42 U.S.C.A. § 675(5)(c) (Supp. 1996) Adoption Assistance and Child Welfare Act.

⁵⁴ 42 U.S.C.A. § 671(a) (Supp. 1996) Adoption Assistance and Child Welfare Act.

overwhelming number of children currently in foster care, the Act is not meeting the goal of permanency planning and family reunification.⁵⁵

III. LIFE AFTER THE ENACTMENT OF AACWA

A. *Termination of Parental Rights Under the AACWA*

Recently, Martin Guggenheim, Professor of Clinical Law and Director of Clinical and Advocacy Programs at New York University School of Law, studied the foster care populations of Michigan and New York over a seven-year period following the adoption of AACWA.⁵⁶ The two states were chosen for his study because they have a significant foster care population, and each maintains a statewide tracking system.⁵⁷ Although neither state has a perfect system of records, Guggenheim used the information gathered to highlight a national trend occurring in foster care today.⁵⁸

In a seven year period in Michigan, from 1986 to 1992, the state ward population rose from 1,700 to 3,030, a 73% increase.⁵⁹ In addition, the annual rate of increase has been steadily accelerating.⁶⁰ Approximately 1,600 children in Michigan are becoming state wards annually, yet the adoption rate is only 1,200 children per year.⁶¹ The study estimates that with an increase of 400 children annually who are not adopted, there will be approximately 5,000 children awaiting adoption by the year 2000.⁶² This figure does not include the number of children who will "age out" of the system at eighteen, without ever having been adopted.⁶³ Parental rights are being terminated in an effort to create permanence and stability in the lives of children by freeing them for adoption, yet some 5,000 children will not immediately benefit from that permanence, and some of them will never benefit at all.⁶⁴

⁵⁵ See Guggenheim, *supra* note 3, at 132-34.

⁵⁶ *Id.* at 126.

⁵⁷ *Id.*

⁵⁸ *Id.* at 126, 132.

⁵⁹ *Id.* at 127.

⁶⁰ *Id.*

⁶¹ *Id.* at 129.

⁶² *Id.*

⁶³ *Id.* Between 1986 and 1992, 325 children were discharged from foster care, many as a result of "aging out" of the system. *Id.*

⁶⁴ *Id.* at 129-30.

The New York study occurred over a five year period, from 1987 to 1991.⁶⁵ In that time, the number of children freed for adoption from the termination of parental rights increased from 1,119 to 2,082.⁶⁶ Out of those figures, the number of children freed but not adopted increased from 732 to 2,495 by the middle of 1992.⁶⁷ Termination of parental rights increased by 86%, and although the rate of adoption increased by 96%, the state ward population increased 225%.⁶⁸

Guggenheim compares this study to national data collected in 1986.⁶⁹ In that study, Margaret Beyer and Wallace Myleniec noted that foster care children who were freed for adoption but not adopted increased fifty percent between 1977 and 1982.⁷⁰ Beyer and Myleniec argue that freeing children for adoption by increasing the number of parental rights terminated does not solve the problem of permanence, and actually creates larger problems of self-identity in the lives of children.⁷¹ This study, along with Guggenheim's, raises the concern that children are being negatively affected by the increase in termination of parental rights because the problem of permanency is not properly being addressed.⁷²

Children freed for adoption but remaining in the foster care system may suffer irrevocable hardship from the destruction of their families.⁷³ Guggenheim argues that the destruction of family ties should be offset by a gain of permanence through adoption,⁷⁴ and that termination hearings should be the last step taken in order to reduce the amount of time children spend in foster care.⁷⁵ Therefore, he proposes some unique changes to the current termination system.⁷⁶

Guggenheim asserts that termination of parental rights should not occur if reasons exist to maintain the parental relationship, such as a child's need for familial relations.⁷⁷ Basically, terminations should oc-

⁶⁵ *Id.* at 130.

⁶⁶ *Id.*

⁶⁷ *Id.* at graph.

⁶⁸ *Id.*

⁶⁹ *Id.* at 133.

⁷⁰ *Id.*

⁷¹ *Id.*; see also Zierdt, *supra* note 10, at 500.

⁷² Guggenheim, *supra* note 3, at 134. The author notes, "State governments appear to be destroying family ties of a large, and a continually increasing, number of children with no concomitant benefit to children. Too many are not being adopted." *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 139.

⁷⁶ *Id.* at 134-38.

⁷⁷ *Id.* at 135.

cur only when necessary to promote the child's welfare.⁷⁸ Courts must ascertain if reunification of the family is not possible, and whether freeing the child for adoption will serve the child's best interest.⁷⁹ In addition, a high probability of adoption for the child must exist.⁸⁰ Guggenheim fashions three conditions to be met before termination may be granted.⁸¹ First, there must be grounds for termination; second, the termination must serve the best interests of the child; third, a high probability that the child will be adopted must exist.⁸²

If termination does occur, termination orders should be conditional and reviewable after one year.⁸³ Because a child's situation may change over a twelve month period, termination orders should be flexible.⁸⁴ After one year the court should determine if adoption has occurred.⁸⁵ If it has, the termination will stand, as the need for permanence no longer exists.⁸⁶ If adoption has not occurred, the court must again ask if adoption is likely to occur in the future.⁸⁷ If the situation has changed and adoption is not likely to occur, the termination order should be revoked and parental rights should be restored, if it is in the child's best interest.⁸⁸ This does not mean the child should be returned home, but rather it allows a child to retain familial ties instead of being parentless.⁸⁹

Although Guggenheim is focusing on the worst case scenario of a child being left parentless, his solutions are not without problems. If after one year the termination order is revoked and reunification is still not possible, and the child subsequently has the opportunity to be adopted, another termination hearing must occur.⁹⁰ Surely this action would create even greater confusion and uncertainty in the life of a child.⁹¹ Also, how would courts determine the "adoptability" of each

⁷⁸ *Id.*

⁷⁹ *Id.* at 136.

⁸⁰ *Id.* at 135.

⁸¹ *Id.* at 136.

⁸² *Id.*

⁸³ *Id.* at 137.

⁸⁴ *Id.* Foster parents may change their mind about adoption, or a change in the foster family might occur. The Child Welfare Agency also may have been incorrect about the adoptability of the child. *Id.*

⁸⁵ *See id.*

⁸⁶ *See id.* at 138.

⁸⁷ *Id.* at 137.

⁸⁸ *Id.* at 138.

⁸⁹ *Id.* at 137-38.

⁹⁰ *Id.* at 138.

⁹¹ *Id.*; see Zierdt, *supra* note 10, at 497, 501. The author notes that often, children experience anger and confusion during termination hearings. *Id.*

child? Congress has already included an adoption subsidy for special needs children under the AACWA,⁹² benefiting children who are considered difficult to place. If Guggenheim's three step plan is adopted, would all special needs children have a difficult time terminating parental rights? Implementing Guggenheim's ideas may also be difficult in a time when society is focusing on recent tragic stories of child abuse.

B. *Recent History*

Erik Dawood of Roxbury, Massachusetts, was killed on January 25, 1996, one week after a DSS case worker visited his home and reported nothing wrong.⁹³ Erik was six years old.⁹⁴ He was one of five children born to Melissa Dawood, described by DSS sources as learning disabled with poor parenting skills.⁹⁵ DSS began monitoring Melissa in March of 1989 after receiving allegations of child abuse.⁹⁶ Over the next six years, Melissa was provided with a multitude of family preservation services.⁹⁷ Despite these services, however, Melissa has given up custody of her two youngest children, and has had a third child taken away from her.⁹⁸ The goal for the Dawood family established by DSS was reunification of all five children.⁹⁹ Erik was killed before reunification could occur.¹⁰⁰ Melissa and her boyfriend are charged with his death.¹⁰¹ It is believed Melissa's boyfriend killed Erik, while Melissa stood by and did nothing to help.¹⁰²

Within a ten day period, Erik was not the only victim of child abuse in Massachusetts.¹⁰³ Four boys were removed from their home in Lowell after allegedly being drugged and raped by their parents.¹⁰⁴ A three year old child in Westport was beaten to death after wetting his pants,

⁹² 42 U.S.C.A. § 601 (Supp. 1996). Factors considered in determining special needs include ethnic background, age, membership in a sibling group, medical condition, or handicap. *Id.*

⁹³ Grunwald, *supra* note 14, at A1.

⁹⁴ *Id.*

⁹⁵ *Id.* at A12.

⁹⁶ *Id.*

⁹⁷ *Id.* Melissa was provided with day care, parenting aid, early intervention programs, visiting nurses, counseling, and home health aid. *Id.* A DSS caseworker visited Melissa every other week. *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See* Grunwald, *supra* note 14, at A1.

¹⁰⁴ *Id.*

and in Mashpee, the parents of a baby boy were indicted on charges of abuse that left their child blind and brain damaged.¹⁰⁵ Yet the story that alarmed the nation occurred in New York.

On Thanksgiving morning, November 23, 1995, six year old Elisa Izquierdo was killed by her abusive biological mother, Awilda Lopez.¹⁰⁶ This happened despite repeated reports of suspected abuse to the Child Welfare Administration (CWA) of New York from neighbors and family friends.¹⁰⁷ Elisa had been in her father's custody since her birth in 1989, but when he passed away in May of 1995, the court system allowed Elisa's mother visitation rights in the hopes of family reunification.¹⁰⁸

Project Chance, a New York based program, stepped in to help Elisa's mother break the cycle of abuse and enable her to bring Elisa home permanently.¹⁰⁹ In September of 1995, Elisa was placed in her mother's custody.¹¹⁰ Only two short months later Project Chance began to regret its recommendation to reunite the family.¹¹¹ Elisa's mother asked to have Elisa removed because she was soiling herself and had cut off her hair.¹¹² Awilda also believed Elisa's father had placed a spell on Elisa that had to be "beaten out of the child."¹¹³ Bart O'Connor, the individual who ran Project Chance, claims he called Elisa's CWA caseworker, who told him he was too busy to come to Awilda's home.¹¹⁴ Despite subsequent calls to CWA, they did not respond quickly enough.¹¹⁵

¹⁰⁵ *Id.*

¹⁰⁶ See Van Biena, *supra* note 14, at 36. Awilda Lopez, Elisa's mother, confessed to having thrown Elisa against a concrete wall, mopping the floor with her head, and forcing Elisa to eat her own feces. *Id.* Police at the scene told reporters there was not one area of Elisa's body that was not covered with cuts and bruises. *Id.*

¹⁰⁷ See *id.* at 34-36. City authorities had been notified eight times over the six years of Elisa's life. *Id.* at 34.

¹⁰⁸ See *id.* at 35. This occurred despite Elisa's father petitioning the court to deny visitation rights. *Id.* Before the court could act on Gustavo Izquierdo's request he became ill with cancer. *Id.* He purchased plane tickets with the hopes of taking Elisa to Cuba. *Id.* He died before his plans were realized. *Id.*

¹⁰⁹ *Id.* Project Chance is a federally funded parenting program for the poor. *Id.* The Child Welfare Administration was also backing the reunification of Awilda's family, and had been monitoring Awilda for more than a year. *Id.*

¹¹⁰ See *id.*

¹¹¹ *Id.* Bart O'Connor from Project Chance began receiving a series of hysterical phone calls from Awilda. *Id.* He visited the home and found feces smeared on the refrigerator. *Id.* He called Elisa's caseworker, who told him he was too busy to see Awilda. *Id.* O'Connor then took Lopez to a city hospital for psychiatric counseling after repeated attempts to contact CWA failed. *Id.* at 35-36.

¹¹² *Id.* at 35.

¹¹³ *Id.* at 36.

¹¹⁴ *Id.* at 35.

¹¹⁵ *Id.*

On Thanksgiving Day, Elisa was brutally killed at the hands of her mother, who confessed to throwing Elisa against a concrete wall.¹¹⁶

Elisa's tragic story made the cover of *Time* magazine on December 11, 1995.¹¹⁷ Citizens of New York were outraged over the protection of the rights of the biological mother at the expense of the abused child.¹¹⁸ The CWA received a great deal of criticism, and responded that lack of funding left their program greatly understaffed.¹¹⁹ Recently, New York City Mayor Rudolph Guiliani demanded the state focus not on the reunification of the family, but rather the protection of the child, especially in cases of parents who abuse drugs.¹²⁰ Mayor Guiliani is not expressing a unique sentiment.¹²¹ Child welfare programs throughout the country have received similar criticisms and complaints, and have responded with tougher child welfare laws.¹²²

C. *The States Respond*

In response to tragic stories of child abuse like Erik's and Elisa's, some states have begun easing the standards surrounding the termination of parental rights.¹²³ On October 1, 1995, a bill concerning termination hearings in the state of Connecticut took effect.¹²⁴ In an effort to reduce the time a child spends in limbo, the bill reduces the review period at which the state can seek termination of parental rights after a child has been in custody from eighteen months to twelve.¹²⁵ The state may seek termination of parental rights at the end of twelve months if the state can prove that they made reasonable efforts to reunite the family, and the parent has failed to rehabilitate himself or herself, or has abandoned the child.¹²⁶

¹¹⁶ *Id.* at 36.

¹¹⁷ See *A Shameful Death; Let Down By the System, Murdered By Her Mom, A Little Girl Symbolizes America's Failure To Protect Its Children*, *TIME*, Dec. 11, 1995, cover.

¹¹⁸ Van Biena, *supra* note 14, at 34.

¹¹⁹ *Id.* CWA commissioner Croft reported CWA's budget has been cut by one-sixth. *Id.* She estimates the average staff members caseload is at 16.9, but some workers report theirs at 25. *Id.* "There are no bodies available to do the work." *Id.*

¹²⁰ See Firestone, *Guiliani Is Forming A New City Agency On Child Welfare*, *N.Y. TIMES*, Jan. 12, 1996, at A1.

¹²¹ See 1996 *Georgia Assembly; First, Protect the Children*, *ATLANTA J. & CONST.*, Jan. 30, 1996, at Editorial Section [hereinafter, *First Protect the Children*]; Grunwald, *supra* note 14, at A12.

¹²² See *id.*

¹²³ See Rabinovitz, *supra* note 15, at B1; Elaine Song, *New Termination Statute Cuts Both Ways*, *CONN. L. TRIB.*, Aug. 28, 1995/Sept. 4, 1995, at 27; *First, Protect the Children*, *supra* note 121; *First Preserve the Child*, *supra* note 15; Ruess, *supra* note 15, at A3; Macris, *supra* note 34, at 1A.

¹²⁴ Song, *supra* note 123, at 27.

¹²⁵ See *id.*

¹²⁶ *Id.*

Connecticut's Governor John Rowland recently proposed additional legislation to make it even easier to remove children from their homes and terminate parental rights.¹²⁷ Under Rowland's proposal, a child under the age of one year can be put up for adoption if a parent has not been in contact with the child for sixty days.¹²⁸ In addition, if a mother uses drugs during her pregnancy, the state can take custody of the child.¹²⁹ It is estimated that this proposal will permit Connecticut to put up for adoption thousands of children currently in foster care.¹³⁰ The proposal resulted from a six month study conducted after the death of nine-month old Emily Hernandez,¹³¹ who was raped by her mother's boyfriend after the state had received two previous reports of abuse and neglect in the Hernandez household.¹³²

In Georgia, State Senator Mary Margaret Oliver of Decatur is sponsoring Senate Bill 611, currently being championed by Georgia's Lt. Governor Pierre Howard.¹³³ Under this bill, parents who have abused, abandoned, or killed one of their children will not be given the chance to do it again.¹³⁴ If a parent seriously injures a child, or allows another adult to injure a child, the state can seek termination of parental rights.¹³⁵ This Senate bill is fashioned after a similar bill in Utah.¹³⁶ The Utah bill provides that if a child has been removed from a home due to abuse once, and then has to be removed again, efforts will be made to find the child a new home.¹³⁷

In New Jersey, a bill was recently passed by the Assembly and the Senate, with the expectation of the Governor's approval, that limits the time in which a child who has been abandoned or deserted will remain under state foster care.¹³⁸ If a child has been under state supervision for six months, and the parents are unknown or cannot be located, the state may begin termination proceedings.¹³⁹

¹²⁷ Rabinovitz, *supra* note 15, at B1.

¹²⁸ *See id.*

¹²⁹ *See id.* The legislation also increases the failure to report fines from \$500.00 to \$1,000.00, imposed on health-care workers, police officers, and educators. *Id.*

¹³⁰ *See id.*

¹³¹ *See id.* The study was commissioned by Governor Rowland, who reviewed Emily's file within hours of her death, and made the file known to the public at a press conference. *Id.*

¹³² *See id.*

¹³³ *First, Protect the Children*, *supra* note 121.

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *Id.*

¹³⁷ *First, Preserve the Child*, *supra* note 15.

¹³⁸ Ruess, *supra* note 15, at A3.

¹³⁹ *See id.*

In Rhode Island, a new law allows the Department of Children, Youth and Families (DCYF) to ask the Family Court to terminate parental rights if substance abuse prevents a parent from caring for a child for a twelve month period, and if there is little hope the child will return home in the near future.¹⁴⁰ If the child is ten years old or younger at the twelve month mark, and is not expected to return home in the next six months, the Family Court judge must order DCYF to file a request to terminate parental rights.¹⁴¹ In the first six months of the law's operation, petitions to terminate parental rights increased from 160 to 225.¹⁴²

Fear of recent cases of child abuse and criticism of DSS services has caused many states to aggressively advocate saving the child first, before focusing on the family.¹⁴³ Government leaders are also responding to the public reports of child abuse. In her book, *It Takes A Village*, First Lady Hillary Rodham Clinton reflects on the growing problem of child abuse and the termination of parental rights.¹⁴⁴ Citing a 1995 report by the United States Advisory Board on Child Abuse and Neglect, Hillary Clinton notes that two thousand children die each year from abuse or neglect,¹⁴⁵ and near fatal abuse and neglect results in the permanent disability of eighteen thousand children each year.¹⁴⁶ Given the severity of these figures, it is easy to see why the First Lady openly advocates child safety taking precedence over family preservation in abuse cases.¹⁴⁷ Further, she writes, "[s]ocial workers and courts

¹⁴⁰ Macris, *supra* note 34, at 1A.

¹⁴¹ *Id.*

¹⁴² *Id.* A problem in Rhode Island, however, is there are not enough judges to hear the large number of termination petitions. *Id.* The normal time lag is ten months, despite the recent appointment of another judge. (Another public defender was also needed for the parents). *See id.*

¹⁴³ *Id.*; *see also First Protect the Child*, *supra* note 121 (discussing Senate Bill sponsored by Georgia State Senator Mary Oliver). "Rather than waste time on services to help families, judges could terminate parental rights and free children for a new and permanent home." *Id.*; Rabinovitz, *supra* note 15, at B1 (discussing Connecticut's call for reform the child protection legislation, responding to the death of Emily Hernandez, a nine month old child who had been raped by her mother's boyfriend, after the state had received two previous reports of neglect in the family). *Id.*

¹⁴⁴ *See* RODHAM CLINTON, *supra* note 14, at 41-44.

¹⁴⁵ *See id.* at 142. The First Lady also quotes from the report: "In the thirty-three years since Dr. C. Henry Kempe first described the Battered Child Syndrome, more children have died from child abuse and neglect than from urban gang wars, AIDS, polio, or measles; yet the contrast in public attention and commitment of resources is vast." *Id.*; *see also* Rochelle L. Stanfield, *Kids on the Block*, THE NAT'L J., Feb. 3, 1996, at 247.

¹⁴⁶ RODHAM CLINTON, *supra* note 14, at 142.

¹⁴⁷ *See id.* at 143.

should make decisions about terminating parental rights of abusive parents more quickly, rather than removing and returning abused children time and again."¹⁴⁸ The public response upon hearing tragic stories of child abuse like Elisa's and Erik's, and upon reading the statistics regarding annual child abuse deaths, naturally is to advocate for the termination of parental rights in order to save the child. Problems arise, however, when saving a child either means having him/her remain in foster care for many years, or results in the creation of a population of legal orphans, with no parental ties.¹⁴⁹

IV. PROPOSED SOLUTIONS

A beginning stage in addressing some of the questions created by the termination of parental rights is to re-focus attention on the child. When a child is removed from the home, permanency planning should begin immediately.¹⁵⁰ To a young child, one year or eighteen months is an eternity;¹⁵¹ "placement decisions need to reflect the child's sense of time."¹⁵² The goal should remain first with the hope for reunification of the family; however, when reunification is not possible, the focus should be on finding a permanent home before the eighteen month time limit set by the AACWA has run.¹⁵³

A. *Keeping Parental Rights Intact*

If reunification with either parent is not possible, Child Welfare Agencies can turn their attention to other family members.¹⁵⁴ The trauma of being removed from a parent can be reduced if a child can be placed with a grandparent, or aunt and uncle.¹⁵⁵ Ideally, the child will already know the family member, therefore reducing the stress of being placed with a stranger.¹⁵⁶ Kinship foster care can also relieve the need for termination of parental rights proceedings, and provide sta-

¹⁴⁸ See *id.* at 143-44.

¹⁴⁹ Guggenheim, *supra* note 3, at 134.

¹⁵⁰ Ratterman, *supra* note 49, at 11.

¹⁵¹ See *id.* at 11.

¹⁵² *Id.*

¹⁵³ *Id.* at 12. If permanency planning begins immediately upon original placement, caseworkers could either provide services to both parent and child in an effort to accelerate reunification, or place children in homes where adoption is likely to occur. *Id.*

¹⁵⁴ See *id.* at 13. Placement with a relative must still be within the best interests of the child, and child welfare agencies must first assure the home of the relative is safe, and the relative has no past history of abuse. *Id.*

¹⁵⁵ See Martha Gottlieb Zwas, *Kinship Foster Care: A Relatively Permanent Solution*, 20 FORDHAM URB. L.J. 343, 354 (1993).

¹⁵⁶ See *id.* at 344.

bility for the child through permanent relative guardianship or custody.¹⁵⁷ If a family member agrees to care for a child, the biological parent can still remain a presence in the child's life, as long as the safety of the child is preserved.¹⁵⁸ If the court, however, determines contact with the biological parent would be harmful to the child, a protective order may be issued along with the guardianship or custody order.¹⁵⁹

The SOS Children's Village¹⁶⁰ in Lockport, Illinois, is another alternative to the termination of parental rights. The Village operates as a modern-day orphanage that provides permanent homes for children of abuse and neglect.¹⁶¹ SOS Children's Villages were founded in 1949 by an Austrian medical student, to care for children abandoned during World War II.¹⁶² Currently more than 300 villages have been built in 125 countries, with only two in the United States.¹⁶³ The Village in Lockport consists of ten two-story homes, each run by a "parent" who agrees to raise the children until they become adults.¹⁶⁴

The Illinois Department of Children and Family Services (DCFS) still maintains its goals of reunification of the family or termination with the expectation of adoption.¹⁶⁵ As a result, DCFS originally did not want to place children in these "permanent temporary" homes.¹⁶⁶ They eventually agreed, however, to place children in the Village who are unlikely to be adopted or returned home, such as siblings in large families.¹⁶⁷

In most cases, parental rights have not been terminated for the children living in the Village.¹⁶⁸ This poses a problem because biological parents are able to return after many years and attempt to re-establish custody.¹⁶⁹ The criticism of the Villages by an attorney for the

¹⁵⁷ See Ratterman, *supra* note 49, at 13.

¹⁵⁸ *Id.* A birthparent may also feel more comfortable maintaining visitations with the child if the visitations occur at the home of a relative. Zwas, *supra* note 155, at 354.

¹⁵⁹ See *id.*

¹⁶⁰ Louise Kiernan, *Question of Permanence: A Modern Day Orphanage Finds Its Philosophy Clashes With State's Child-Welfare Bureaucracy and Policies*, CHI. TRIB., Jan. 7, 1995, at C1.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* This hesitancy existed despite the possibility of children spending years in the "temporary" custody of foster care. *Id.*

¹⁶⁷ *Id.* Children with siblings are usually described as "special needs" children because they are more difficult to place together in an adoption. *Id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.* Two "families" within the SOS Children's Village face losing children to the

American Civil Liberties Union is that these facilities are not home: "most of these places are not places you go back to when you're twenty-two and you're coming for Christmas—and that's what a home is."¹⁷⁰ Moses Kabbia, a college student who grew up in an SOS Village in Sierra Leone, countered that belief, however, when he stayed at the village in Lockport over his Christmas break: "That was the only place that would accept me. . . . It was home."¹⁷¹

In Australia, termination of parental rights is not an option in child custody matters.¹⁷² The Children Act of 1987 allows for state custody or supervision of a child removed from the home, but it never mentions terminating the parental rights.¹⁷³ The child remains under the care of the guardian or the state until the age of eighteen, or until the guardianship is discontinued.¹⁷⁴ Although this process allows for the retention of parental rights, the issue of permanence is never addressed. Therefore, the system appears no better than permanent foster care or orphanages.

Another option available to advocates such as Guggenheim who do not want to terminate parental rights, is an "open" or "weak" adoption.¹⁷⁵ In an open adoption, most but not all of parental rights are terminated, similar to visitation rights often granted in divorces.¹⁷⁶ The adoptive parent still retains control over the child's behavior.¹⁷⁷ If disputes occur between the adoptive family and the biological parent, most courts defer to the adoptive parent to control the situation.¹⁷⁸

biological parents after many years. *Id.* The "parents," however, attempt to take the possibility of losing their children with a positive attitude. *Id.* "I try to look at it that, while they are here, they're not being moved from house to house anymore." *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Peter J. McGovern, *Child Neglect and the Termination of Parental Rights: A Final Remedy in Need of Reconsideration*, 8 AM. J. FAM. L. 213, 216 (1994).

¹⁷³ *Id.* The Act provides as follows:

(3) If it is satisfied that the child is in need of care and that it is likely to result in significant improvement in the standard of care given to the child:

- (a) It may make an order placing the child under supervision of an officer.
- (b) Where a suitable person is willing to have the custody of the child it may make an order placing the child in the custody of that person.
- (c) Or it may make an order declaring the child to be a ward under the Act.

Id. at 217.

¹⁷⁴ *Id.*

¹⁷⁵ See Zierdt, *supra* note 10, at 498.

¹⁷⁶ *Id.* at 499.

¹⁷⁷ *Id.* The visitation rights would still be legally enforceable. *Id.*

¹⁷⁸ *Id.*

Those who do not believe in termination of parental rights view this option as preferable because it still allows the biological parent to have some ties to the child, so long as those ties are in the best interests of the child.¹⁷⁹ Parents may be more willing to consent to a partial termination if they know they can communicate with their children, and that they will have visitation and other rights.¹⁸⁰ This consent allows adoptive parents who are hesitant about engaging in a long termination hearing the ability to be reassured by an easier procedure.¹⁸¹

The child can benefit from an open adoption by maintaining contact with his/her biological parent, a source of identity.¹⁸² This would also preserve ties to the extended biological family.¹⁸³ In this way an adoption would be easier for children to accept because their parents are not abandoning them, but rather will remain in contact; thus allowing for the possibility of the formation of a healthy relationship.¹⁸⁴

Opponents of the weak or open adoption proposal argue that adoptive parent(s) may be more fearful of an open adoption approach.¹⁸⁵ Presence of the biological parent(s) in the child's life may cause confusion for the child, either due to conflicts of loyalty toward the adoptive and birth parents, or due to differing ethical or moral standards of both parents.¹⁸⁶ Additional problems may arise in the decision making process if the adoptive parent(s) and the biological parent(s) are unable to communicate.¹⁸⁷ If, however, the courts enforce the adoptive parents' decision making authority, and maintain as the ultimate focus the best interests of the child, weak adoptions can be effective, and reformed if problems occur.¹⁸⁸

¹⁷⁹ *Id.* at 499, 505.

¹⁸⁰ *Id.* at 505.

¹⁸¹ *Id.* The author makes the argument that many adoptive parents are unwilling to engage in the long and tedious process of termination hearings. *Id.* If the biological parent agrees to a simple termination knowing he or she may retain some visitation rights, the adoptive parents may be less hesitant to proceed. *Id.*

¹⁸² *Id.* at 506-10. Zierdt turns to evidence of adult adoptees searching for their birth parents as evidence of the strong bond between biological parent and child. *Id.* at 506-07. She also uses examples from the French, Polynesian, and Eskimo cultures that encourage adoptive children retaining knowledge of and ties with their biological parents. *Id.*

¹⁸³ *See id.*

¹⁸⁴ *Id.* The adoption process may also be stressful and confusing for children. If a parent consents, however, a long court proceeding would not be required. *Id.*

¹⁸⁵ *See id.* at 512. Adoptive parents may fear they do not have control over decisions in the adoptive child life, or they may fear the birthparent(s) will disrupt the new placement. *Id.*

¹⁸⁶ *See id.* at 513.

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

B. *Adoption is the Option*

The Congressional Coalition on Adoption, headed by the bi-partisan leadership of Senator Larry E. Craig (R-Ohio) and Senator Paul Simon (D-Illinois), believes adoptions should be made easier.¹⁸⁹ So do other political rivals who normally do not agree on many issues, such as Speaker of the House Newt Gingrich and First Lady Hillary Rodham Clinton.¹⁹⁰ These politicians believe that when welfare reform begins, adoptions will be relied on to save the child welfare system.¹⁹¹ If increasing adoptions is the solution to cutting child welfare, adoptions will not only have to be made easier, but they will also have to be emphasized.¹⁹²

If parental rights have been terminated, and kinship foster care is not available, children should be placed in homes that have expressed an interest in adoption.¹⁹³ If the foster parents are not interested in adoption, the child should be moved to foster care where adoption is a goal.¹⁹⁴ This would allow the child to be placed in a home that is more likely to become permanent.¹⁹⁵ Furthermore, this should be done quickly. Children who remain in foster care for long periods of time often have low self esteem, and difficulty in forming relationships later in life.¹⁹⁶ Permanency and a feeling of belonging to a family is important to the development of children.¹⁹⁷

Conna Craig, founder of the Institute for Children in Cambridge, Massachusetts, advocates the need for speedy adoptions of children languishing in foster care.¹⁹⁸ Craig, a child of foster care herself, blames an inefficient government system for the over 50,000 children in foster care today.¹⁹⁹ She criticizes the media and birthparent organizations for creating a belief that adoptions have no happy endings.²⁰⁰ She

¹⁸⁹ Stanfield, *supra* note 145, at 247.

¹⁹⁰ *Id.*

¹⁹¹ See generally Verne Barry et al., *supra* note 7, at 8-10.

¹⁹² See *id.* at 9.

¹⁹³ Ratterman, *supra* note 49, at 11-12.

¹⁹⁴ *Id.* at 12.

¹⁹⁵ *Id.* at 11.

¹⁹⁶ *Id.* at 12.

¹⁹⁷ *Id.* at 11.

¹⁹⁸ See Verne Barry et al., *supra* note 7, at 9-10; Charen, *supra* note 2, at 15A; Craig, *supra* note 3, at 43.

¹⁹⁹ See Craig, *supra* note 3, at 45.

²⁰⁰ *Id.* at 43.

TV portrays adoption as shady, risky, and shameful. Over the last year, a dozen programs featured adoption in their plots, and in every case the adoption agency

believes every child is adoptable, but when state agencies fail to recruit enough adoptive families and potential families are turned off by the long waiting periods or turned down because of racial bias, children are the ones made to suffer.²⁰¹

Craig is not looking for more government funding for the child welfare system.²⁰² She believes the child welfare system creates financial incentives to keep children in foster care through the payment of tax-free foster care subsidies, rather than creating incentives to actively seek adoptive homes.²⁰³ States are given money for children in foster care, but they are neither encouraged to find adoptive homes, nor penalized for not finding homes.²⁰⁴

This dilemma occurs with the foster parent payment as well. Foster parents are paid a tax-free monthly sum to care for children, which increases as the children get older.²⁰⁵ Adoption subsidies, if available, cannot exceed, and are often lower than foster care payments.²⁰⁶ In some cases, children are just a source of income for foster families.²⁰⁷

According to Craig, complete reform of the adoption system is necessary.²⁰⁸ In order to begin such reform, states can follow a program created by Ms. Craig called Assignment: Adoption.²⁰⁹ This program was adopted by Massachusetts Governor William Weld under Craig's plan, "What A Governor Can Do."²¹⁰ The number of adoptions in Massachusetts increased from 599 in 1992 to 1,068 in 1994.²¹¹ This increase was accomplished through legal reforms, computerized tracking of chil-

was depicted as callously profit-driven. The adopting families were white, middle-class couples who kept secrets from the authorities or from each other. Birth mothers were unfairly portrayed as selfish or disturbed. . . . Groups such as Concerned United Birthparents (CUB) help give legal expression to this bias. CUB was behind the "Baby Jessica" case that led to the removal of a two-year-old from her adoptive family. Groups like CUB claim that adoption is a feminist issue, that only the outmoded ideal of a two-parent family makes the notion of adoption palatable.

Id.

²⁰¹ *Id.* at 43.

²⁰² *See id.* at 41-42.

²⁰³ *Id.* Craig notes, "In some states, payments to foster parents caring for four kids equals the after-tax income of a \$35,000 a year job. The money is tax free. It doesn't take much imagination to see that paying people to parent can lead to mischief." *Id.*

²⁰⁴ *Id.* at 42.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 46-48.

²⁰⁹ *Id.* at 46-49.

²¹⁰ *See* Charen, *supra* note 2, at 15A.

²¹¹ *Id.*

dren available for adoption, and aggressive recruitment of adoptive families.²¹² Arguably if one state can accomplish this goal, then all can.

The first step in the plan is recognizing that all children are adoptable.²¹³ The notion of "special needs" children is rejected because that term has been used to indicate difficulty in placement.²¹⁴ This term has been used to encompass so many groups, that children who actually do require special care are being lumped together with other children who do not have special needs.²¹⁵ Despite the supposed difficulty to place special needs children, there are currently waiting lists to adopt Caucasian children, African-American children, Hispanic children, infants and teens, children with Down's Syndrome, and children with AIDS.²¹⁶ A California-based organization called "Adopt a Special Kid" receives over 1,500 inquiries each year from families who are interested in adopting children with disabilities.²¹⁷ Clearly Americans want to adopt children, as evidenced by the fact that in 1993, Americans adopted more than 7,300 children from other countries, and more than 8,000 in 1994.²¹⁸

Craig believes adoptions will increase if part of the foster care and adoption program is handled by private agencies to increase competition.²¹⁹ Private adoption agencies do not make money unless they place children in adoptive homes.²²⁰ As a result, they are more aggressive with their recruitment of adoptive families, and Craig believes that aggressiveness will encourage the state to do the same.²²¹ If the state has not found a qualified family within thirty days after the termination of

²¹² *Id.* "Beginning in November 1993, Massachusetts stepped up its recruitment efforts with public-service announcements. Such efforts helped increase foster child adoptions by 47% in one year." *Id.*

²¹³ *See* Craig, *supra* note 3, at 44.

²¹⁴ *See id.* at 44. Craig believes that states have broadened the criteria for special needs because they receive federal subsidies for such children. *Id.* Special needs in some states now include Hispanic children, African-American children, biracial children, children with siblings, Native Americans, or "older children." *Id.* This term also includes children who have been in foster care longer than eighteen months. *Id.*

²¹⁵ *Id.* at 42.

²¹⁶ *Id.*

²¹⁷ *Id.* "The National Adoption Center maintains a computerized listing of 650 qualified families waiting to embrace disabled 'older' children." *Id.*

²¹⁸ *Id.* at 45. The figure of 8,000 is based on estimates by the U.S. Immigration and Naturalization Service. *Id.*

²¹⁹ *Id.* In Michigan, where two-thirds of foster care management is privatized, private providers spend less per child, yet have achieved better social worker-to-child ratios than those of state-run agencies. *Id.*

²²⁰ *See id.*

²²¹ *See id.* at 48.

parental rights, then they would be forced to contract out the adoption to a private agency.²²²

Race-based delays in adoption should also be re-examined.²²³ In 1972, the National Association of Black Social Workers wrote in its position paper, "Black children belong physically, psychologically, and culturally in Black families in order that they receive the total sense of themselves."²²⁴ It is argued that this policy, however, has resulted in more harm to the African-American community than anywhere else.²²⁵ Fifteen percent of all children in America are African-American, but forty percent of all children in foster care are African-American.²²⁶ African-American children may have to spend longer time in the system in order to be culturally matched with an African-American parent.²²⁷ As a child of a multi-ethnic foster home herself, Craig advocates for breaking down the barriers to transracial adoption.²²⁸

Opponents to transracial adoption argue that minority children need support, affirmation, and coping skills from individuals of the same cultural background in order to cope in a discriminating society.²²⁹ They reject the statistical argument that black children are victimized by their disproportionate representation in foster care, and some assert the argument for transracial adoption is motivated by white society deciding whom they wish to parent.²³⁰

Three years ago, Michigan launched a carrot-and-stick program with public and private adoption agencies to get kids into permanent homes more quickly. Since then, total adoptions are up, and the number of black children adopted has increased by 121%—about 700 kids in the past year alone.

Id.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 43.

²²⁵ *See id.*

"These policies are seriously harmful to black children, requiring that black kids who could get good homes be left in foster care," Harvard law professor Elizabeth Bartholet told the *New York Times*. "Where there is not an iota of evidence in all the empirical studies that transracial adoption does any harm at all . . . there is plenty of evidence that delay in adoption does do harm."

Id.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 43, 47. Craig believes if African-American children grew up in loving and nurturing white families or mixed-race families, an amazing generation of children would be created. *Id.* at 47. A loving inter-racial home is better than being raised in no home at all. *Id.*

²²⁹ *See* Ruth-Arlene Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE GENDER L. & POL'Y 131, 131-32 (1995).

²³⁰ *See generally id.*

If various cultural communities could be encouraged to become adoptive parents in the same proportion to children needing care, racially based placement preferences could be honored. Children, however, should not have to live in limbo while adults decide to act, and placement should be made across racial lines until such time as demand and availability meet.²³¹

Craig also advocates a twelve month time limit for parents to resume custody, or have their rights terminated.²³² Although children are meant to remain with their biological parents, abuse of children at the hands of their parents cannot be tolerated by society.²³³

I agree that nature provides every child with two protectors—a man and a woman—and that we're meant to be with our biological parents. But nature didn't design women's bodies to endure crack cocaine; it didn't design children to be shaken until they suffer cerebral hemorrhages. Family preservation doesn't work in these cases because there is nothing left to preserve.²³⁴

In contrast to Guggenheim's article on the termination of parental rights dilemma,²³⁵ we should turn our focus on the adoption dilemma. With a concerted effort toward the encouragement of adoption, we can reduce the number of children in foster care.

States are beginning to respond to the foster care crisis with the same zeal Conna Craig expresses.²³⁶ New York City is trying a unique approach to encourage adoptions, with billboards asking, "Do you have room for one more?"²³⁷ In New York City, Boston, Los Angeles, and Miami, churches are becoming involved in the active recruitment of families.²³⁸ Social workers are speeding up adoptions by using computers to compile home studies rather than performing them by hand.²³⁹ Paralegals are handling more of the paperwork as opposed to over-bur-

²³¹ See Craig, *supra* note 3, at 45, 47.

²³² *Id.* at 49.

²³³ See *id.*

²³⁴ *Id.*

²³⁵ See generally Guggenheim, *supra* note 3.

²³⁶ See *Foster Care Adoptions Gaining New Emphasis—Social Workers, Computers, Speed Up Process For Parents*, CHARLESTON DAILY MAIL, Nov. 24, 1995, at 6D [hereinafter *Foster Care Adoptions Gaining New Emphasis*].

²³⁷ See *id.*

²³⁸ *Id.*

²³⁹ *Id.*

dened lawyers, and judges have been encouraged to stop granting endless adjournments.²⁴⁰ In New York City, adoptions from foster care have risen fifty-eight percent in the last fiscal year, from 2,312 to 3,665.²⁴¹ These accomplishments are due to a renewed commitment to foster care based on cities struggling against funding cuts for social services.²⁴²

In St. Louis, a local newspaper, the St. Louis Post-Dispatch, uses a weekly news segment called "Monday's Child" in order to introduce adoptive children to interested parents.²⁴³ Also, the W. K. Kellogg Foundation of Michigan has begun distributing forty-two million dollars in grant money to promote foster care adoptions in Washington, Kansas, North Carolina, and other states.²⁴⁴

In Florida, Special Needs Adoption Picnics are held to introduce children eligible for adoption to interested parents.²⁴⁵ The atmosphere is relaxed and fun, as children play games, do crafts, and enjoy an outdoor picnic.²⁴⁶ The picnic is organized by a Special Needs Adoptions Council, which brings together local agencies, corporations, and the Department of Health and Rehabilitative Services (HRS) to create community-wide participation.²⁴⁷ An eighteen page color brochure is produced free of charge called Children in Waiting, featuring pictures and descriptions of the children.²⁴⁸ Although HRS has increased its adoptions from 45 three years ago to 200 last year, 165 children still remain in foster care, with 179 cases pending termination.²⁴⁹ The picnics are an attempt to close the gap between children waiting to be adopted and the children being adopted.²⁵⁰

²⁴⁰ *Id.*

²⁴¹ *Id.* These figures are from 1994-95.

²⁴² *Id.*

²⁴³ Martha Shirk, *Monday's Child*, ST. LOUIS POST-DISPATCH, Mar. 4, 1996, at 1E.

²⁴⁴ See *Foster Care Adoptions Gaining New Emphasis*, *supra* note 236.

²⁴⁵ See Marlene Sokol, *Hope is Main Course At Adoption Picnic*, ST. PETERSBURG TIMES, July 23, 1995, at 1B.

²⁴⁶ See *id.*

²⁴⁷ *Id.*

²⁴⁸ See *id.* Adoptive parents must go through several meetings first to make sure the match is right between parent and child. *Id.* Perspective parents are taking their time to find just the right child. *Id.* "Joe and Melody Ely of Brandon, who hope to adopt, said they might attend several picnics as they weigh crucial decisions such as how many children to adopt, what ages to look for, and whether race should be a factor." *Id.*

²⁴⁹ See *id.* HRS has recently been criticized by a Miami public interest lawyer, who alleged in federal court that HRS was leaving children in foster care too long. *Id.*

²⁵⁰ See *id.*

The internet is also being used to introduce potential adoptive parents to children waiting for a home.²⁵¹ "Without leaving their homes, people interested in adoption can get information they need and see the faces of some of the children who need families."²⁵²

In August of 1995, the National Adoption Center in Philadelphia, and Children Awaiting Parents, utilized grants from the U.S. Department of Health and Human Services and the Dave Thomas Foundation to create "Faces of Adoption: America's Waiting Children."²⁵³ Over 150 hard-to-place children, are currently listed on the Internet.²⁵⁴ Profiles of the children are displayed, along with information about their illness, disability, or desire to be placed in a home with their sibling.²⁵⁵ Individuals working with children and families believe the internet will change the adoption process forever, and revolutionize the way adoptions are done in this country.²⁵⁶ "The agencies, states, and services that are on line report an increase in calls for information."²⁵⁷

C. Welfare Reform and the Impact on Foster Care

Governmental focus on increasing adoption is necessary for two reasons: first, to create permanency in the lives of children; second, to ease states' reliance on federal funds for foster care in light of impending welfare reform.²⁵⁸ It was estimated that by the end of 1995, there were more American children living in foster care than there were people living in Washington, D.C.²⁵⁹ With forty-three percent of foster children remaining in care for longer than two years, the burden on federal matching funds has been overwhelming, and the once "temporary" solution of foster care has become a welfare nightmare.²⁶⁰

The problem, however, does not end with children currently in foster care. Fifteen thousand children age out of the foster care system

²⁵¹ Laura Griffen, *Family Connections; Parents Seeking, Finding Adoptable Children On Net*, DALLAS MORNING NEWS, Mar. 3, 1996, at 1A; Paul Levy, *Hard-to-Place Adoptive Children Now On Internet*, HOUS. CHRON., Feb. 26, 1996, at 1 [hereinafter *Hard-to-Place Adoptive Children*]; Paul Levy, *Internet Offers New Options For Adoption*, ATLANTA J. & CONST., Feb. 22, 1996, at Features [hereinafter *Internet Offers New Options*].

²⁵² Griffen, *supra* note 251, at 1A.

²⁵³ Levy, *Hard-to-Place Adoptive Children*, *supra* note 251, at 1.

²⁵⁴ See *id.*

²⁵⁵ *Id.*

²⁵⁶ See Griffen, *supra* note 251, at 1A.

²⁵⁷ *Id.*

²⁵⁸ Verne Barry, et al., *supra* note 7, at 9.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

each year, and it is believed many of these children immediately become dependent on other social service programs.²⁶¹ In studies conducted in both Los Angeles and Minneapolis, between thirty-eight and thirty-nine percent of each city's homeless population had been foster children.²⁶² According to the American Civil Liberties Union, forty percent of all children leaving the foster care system will end up on welfare.²⁶³

Children aging out of the system have no guiding adult figure, and judging from the above mentioned statistics many of them are lost.²⁶⁴ If greater emphasis is placed on finding adoptive parents for children in the foster care system, welfare burdens on the state and federal government can be reduced two-fold: first, by removing children from AFDC dependency, and second, by helping to provide children with permanent, stable lives.²⁶⁵ In this way, fewer children will be left alone to care for themselves at age eighteen, and will therefore be less likely to be a burden on the welfare system.

IV. CONCLUSION

Foster care, originally intended to be a temporary solution, has become a financial burden on the states and federal government,²⁶⁶ as well as an emotional nightmare for children continuing to drift from one temporary home to another.²⁶⁷ Although Guggenheim's study highlights the problem created by termination of parental rights without finding children permanent homes,²⁶⁸ his suggestion to keep parental rights intact unless adoption occurs does not address the financial burden created. Furthermore, it only indirectly touches on the emotional burden.

²⁶¹ *Id.* "A New York City program found that one-third of foster care graduates were on AFDC or the city's Home Relief Program within 18 months of leaving care." *Id.*

²⁶² *Id.*

²⁶³ Craig, *supra* note 3, at 41.

²⁶⁴ See Verne Barry et al., *supra* note 7, at 8-9.

²⁶⁵ See generally Craig, *supra* note 3.

²⁶⁶ Verne Barry et al., *supra* note 7, at 9-10. It is estimated that ten billion dollars are spent annually on the child welfare system.

²⁶⁷ Craig, *supra* note 3, at 41. Craig tells the story of a young girl who came to work for her. *Id.* The girl asked Craig why money was being taken out of her paycheck by the government, and Craig tried to explain what the money was paying for. *Id.* "She actually started to cry. She looked at me and asked, 'Will it go to pay for foster care?' She said it hurt her that she had worked so hard only to help the government keep some other child from being adopted." *Id.*

²⁶⁸ See generally Guggenheim, *supra* note 3.

If we want to create permanency in the lives of children, we need to return our focus to the children. Evidence of foreign adoptions indicates that there are thousands of American families who want to adopt children.²⁶⁹ Advocates like Conna Craig are calling on us to actively re-invent our adoption system with very simple reforms.²⁷⁰ If we can increase the number of adoptions, we will not only reduce the financial burden on the child welfare system, but, more importantly, we will help to create permanency in the lives of children who are currently left alone.²⁷¹ As adults, we are responsible for all children, and they deserve not only our attention, but our best efforts. The children are waiting.

²⁶⁹ *Id.*

²⁷⁰ *See generally* Craig, *supra* note 3.

²⁷¹ *See id.*